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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1974

PAUL PHILBROOK,
APPELLANT

vs.

JEAN GLODGETT, ET AL.,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Paul Philbrook, successor in office to Joseph Betit as Commissioner of the Vermont Department of Social Welfare,[1] appeals from the order of the three-judge United States District Court for the District of Vermont dated February 21, 1974. This statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

[1] In addition to Joseph Betit, who was named individually and as Commissioner, the defendants below included Elliott Richardson, individually and as Secretary of the United States Department of Health, Education, and Welfare. The plaintiffs included Jean and Deanna Glodgett, individually and on behalf of their minor child Tina; Roger, Sr. and Rosamond Percy, individually and on behalf of their minor children, Sharon, Sheila, Roger, Mary, Matthew, and Charon Percy; and Roger C. and Arlene M. Derosia, individually and on behalf of their minor children, Larry, Harold, Arthur, Mary and Brian Derosia. The named plaintiffs also sued on behalf of all others similarly situated.

OPINION BELOW

The opinion of the United States District Court is reported at 368 F. Supp. 211 (1973), and is attached hereto as Appendix A. The Court's order of judgment, which is not reported, is attached hereto as Appendix B.

JURISDICTION

This suit was brought in the United States District Court for the District of Vermont by appellees on behalf of themselves and all others similarly situated against the Commissioner of the Vermont Department of Social Welfare (the appellant herein) and the Secretary of the United States Department of Health, Education and Welfare. The action against the Commissioner was based on 42 U.S.C. §1983, and sought declaratory and injuctive relief and damages. Jurisdiction of the District Court over both defendants was invoked pursuant to 28 U.S.C. §1343 (3).

Appellees sought a declaration that 42 U.S.C. §607 (b) (2) (C) (ii)[2] and §2333.1(3) of the Vermont Welfare Assistance Manual[3] violate respectively the Due process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that they deny benefits to families under the Unemployed Father provisions of the federal-state Aid to Needy Families with

[2] Section 407(b)(2)(C)(ii) of the Social Security Act of 1935, as amended, 82 Stat. 273. Since the District Court's opinion was written in terms of §607(b)(2)(C)(ii) of title 42 of the United States Code, the appellant will use this citation throughout as well.

[3] This provision is of state-wide applicability, promulgated pursuant to the provisions of 33 V. S. A. §§2504 (b) (3) and 2505 (c) (2).

[4] Vermont has chosen to refer to this program as "Aid to Needy Families with Children" rather than "Aid to Families with Dependent Children" as it is referred to in the Social Security Act and elsewhere. The Vermont program shall be referred to hereinafter as "ANFC." When reference is to the Unemployed Father provisions, the program shall be referred to as "ANFC-UF".

Children[4] program for those weeks in which an otherwise eligible father receives unemployment compensation. Since injunctive relief was sought against the enforcement of the above-mentioned federal statute and state regulation on constitutional grounds, a three-judge United States District Court was convened pursuant to the provisions of 28 U.S.C. §§2281-2282. The decision of the three-judge Court, however, was based on a construction of the statute and regulation, and the constitutional issues were not reached.

The judgment sought to be reviewed was entered on February 21, 1974. (Appendix B). Appellant's notice of appeal was filed on April 9, 1974, in the United States District Court for the District of Vermont. A copy of the notice of appeal is attached hereto as Appendix C.

The statutory provisions believed to confer jurisdiction on the Supreme Court to hear this direct appeal are 28 U.S.C. §§1253 and 2101(b).

Cases believed to sustain the jurisdiction are *Hagans v. Lavine*, 94 S. Ct. 1372 (1974); *Engineers v. Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966); and *Florida Lime & Avacado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960).

STATUTE AND REGULATION INVOLVED

42 U.S.C. §607(b)(2)(C)(ii) reads as follows:

> (b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title . . .
>
> (2) provides . . .
>
> (C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section . . .
>
> (ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

The full text of 42 U.S.C. §607 is attached hereto as Appendix D.

Section 2333.1(3) of the Vermont Welfare Assistance Manual reads as follows:

> An "unemployed father" is one whose minor children are in need because he is out of work, is working part-time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that . . .
>
> (3) He is not receiving Unemployment Compensation during the same *week* as assistance is granted. [emphasis in original text]

The full text of §2333.1 is attached hereto as Appendix E.

QUESTION PRESENTED

1. Was the District Court correct in deciding that 42 U.S.C. §607(b)(2)(C)(ii) and §2333.1(3) of the Vermont Welfare Assistance Manual exclude families from ANFC-UF benefits for only those weeks in which an otherwise eligible father actually receives unemployment compensation, and thereby provide the father with the option of rejecting unemployment compensation for which he is qualified in favor of ANFC benefits, or must the father be ineligible for unemployment compensation before his family may be eligible for ANFC-UF?

STATEMENT OF THE CASE

1. Introduction

This case arises under Title IV-A of the Social Security Act of 1935, as amended, (42 U.S.C. §§601-610), which establishes the federal-state Aid to Families with Dependent Children (AFDC) program. The Social Security Act provides for substantial federal payments to states for the funding of state assistance programs on behalf of families with a dependent child or children. In order to be eligible for federal payments, however, there must be a "state plan" under

42 U.S.C. §602(a) which meets all of the relevant requirements of the statute and its implementing regulations.

For purposes of the AFDC program, a "dependent child" is defined in 42 U.S.C. §606(a) to mean, in part, a needy child who is deprived of parental support or care because of the death, continued absence from the home, or physical or mental incapacity of a parent.[5]

In addition, states are given the option[6] under 42 U.S.C. §607 (a)[7] to expand the definition of "dependent child" to include a needy child who has been deprived of parental support because of his father's unemployment. If a state plan provides for payments to families whose child is de-

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[5] 42 U.S.C. §606(a) reads as follows:

> The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . .

[6] As of November, 1973, the Unemployed Father provisions were in effect in 24 states. See *Public Assistance Statistics November, 1973* DHEW Publication No. (SRS) 74-03100, NCSS Report A-2 (11/73), Table 8.

[7] 42 U.S.C. §607(a) reads as follows:

> The term "dependent child" shall, notwithstanding section 606 (a) of this title, include a needy child who meets the requirements of section 606 (a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606 (a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

pendent because of the father's unemployment, the state must, among other things, meet the requirements of §607 (b) (2) (C) (ii).

That section requires that a state plan provide for the denial of assistance to such families with respect to any week for which the child's father receives unemployment compensation under a state or federal unemployment compensation law. This provision is implemented by a regulation promulgated by the United States Department of Health, Education and Welfare, set forth at 45 C.F.R. §233.100(a) (5) (ii).[8]

The State of Vermont participates in the Unemployed Father segment of the AFDC program under an approved state plan. In order to comply with the above-mentioned requirements, the Vermont Department of Social Welfare has promulgated §2333.1(3) of the Welfare Assistance Manual which parallels 42 U.S.C. §607(b) (2) (C) (ii), and provides for the denial of ANFC-UF benefits for any week during which the unemployed father receives unemployment compensation.

2. Prior Proceedings

Appellees (plaintiffs below) are members (parents and minor children) of three Vermont families. Two of the families were terminated from the receipt of ANFC-UF benefits once the father began to receive weekly unemployment compensation. The third family's application for

[8] 45 C.F.R. §233.100 (a) (5) (ii) reads as follows:

(a) Requirements for State Plans. If a state wishes to provide AFDC for children of unemployed fathers, the state plan under Title IV — Part A of the Social Security Act must, except as specified in paragraph (b) of this section . . . (5) Provide for the denial of such aid to any such dependent child or the relative specified in section 406 (a) (1) of the Act [42 U.S.C. §606 (a) (1)] with whom such child is living, . . . (ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

ANFC-UF was denied because the father, at the time of application, was receiving unemployment compensation. In each case the amount of weekly unemployment compensation was less than the amount the family had been receiving or would have received under ANFC.

Suit was brought on March 6, 1972, in United States District Court for the District of Vermont seeking declaratory and injunctive relief and damages. The action against the appellant was brought pursuant to the provisions of 42 U.S.C. §1983. The suit challenged the constitutionality of 42 U.S.C. §607(b) (2) (C) (ii) and §2333.1 (3) of the Vermont Welfare Assistance Manual alleging that the statute and regulation violated respectively the Due Process Clause of the Fifth Amendment and Due Process and Equal Protection Clauses of the Fourteenth Amendment. The appellees alleged that the court had jurisdiction over the appellant under 28 U.S.C. §§1343(3) and (4) and 28 U.S.C. §1331, and over the federal defendant under 28 U.S.C. §1361 and 28 U.S.C. §1336. A three-judge Court was convened under 28 U.S.C. §§2281-2282.

At the oral argument held on March 5, 1973, appellees raised for the first time a statutory claim. They suggested that the families could avoid disqualification under §607 (b) (2) (C) (ii) and §2333.1(3) if the father refused to accept the unemployment compensation to which he was entitled. It was argued that the statutory and regulatory provisions exclude a family from eligibility only for those weeks in which the unemployed father actually receives unemployment compensation.

The three-judge Court determined that jurisdiction existed over both defendants under 28 U.S.C. §1343(3), but decided the case on the basis of the statutory claim, thereby avoiding a decision on the constitutional issues.

3. The District Court's Decision

In its opinion of October 17, 1973, the Court found that actual receipt of and not eligibility for unemployment compensation was controlling for ANFC-UF eligibility. From this determination, the Court concluded that an individual otherwise eligible for both programs could take his choice.[9]

The final order, issued February 21, 1974, enjoined appellant from denying ANFC-UF to any individual eligible for unemployment compensation in that it prohibited appellant from compelling any individual to avail himself of unemployment compensation benefits and required the appellant to advise applicants of this option. Even though the case was not certified as a class action, the order bound the appellant with respect to all others similarly situated.

Appellant's stay of execution of the judgment was granted on March 1, 1974, and his notice of appeal was filed on April 9, 1974.

THE QUESTIONS ARE SUBSTANTIAL

The District Court's interpretation that 42 U.S.C. §607 (b) (2) (C) (ii) and §2333.1(3) of the Vermont Welfare Assistance Manual provide an option whereby a father may reject unemployment compensation in order that his family may become eligible for AFDC benefits is erroneous.

It is the appellant's contention that the Court's construction of 42 U.S.C. §607 (b) (2) (C) (ii) and §2333.1 (3) of the Vermont Welfare Assistance Manual is incorrect. The Court fixed its attention on the word "receives" in the statute and regulation, and interpreted that word narrowly to mean *actual* receipt. Such an interpretation, however, is utterly unwarranted in the welfare area, as is demonstrated below.

[9] On January 8, 1974, the Court issued a supplemental opinion and order which, among other things, denied the appellant's motion for a new trial and appellees' motion for a rehearing with respect to the Court's denial of class action certification.

While as a general principle the ordinary meaning of statutory language should be given effect, a literal construction should not be followed when the result of such a construction can be shown to conflict with the intent of other relevant provisions of the same statutory scheme. *E.g.*, *Malat* v. *Riddell*, 383 U.S. 569, 571-72 (1966); *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Such a conflict is present here.

In addition, when the intended scope of a statutory provision is called into question with respect to a particular set of facts, it is appropriate to consult the legislative history in order to determine Congressional intent. *E.g.*, *Allen* v. *State Board of Elections*, 393 U.S. 544, 570 (1969). Reviewing the legislative history is also necessary when a literal construction of a statute produces an extraordinary result. *E.g.*, *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184 (1967). These principles are also applicable to the instant case.

1. The Court's interpretation creates an irreconcilable conflict between the provisions in question and other relevant provisions of the federal and state AFDC programs.

When 42 U.S.C. §607 (b) (2) (C) (ii) and §2333.1 (3) of the Vermont Welfare Assistance Manual are considered in relation to other relevant statutory and regulatory provisions, it becomes clear that the word "receives" as used in each is meant to encompass qualification for receipt,[10] as well as actual receipt.

A provision of primary relevance is 42 U.S.C. §602 (a) (7). When §607 (b) (2) (C) (ii) is read in concert with §602 (a) (7) and the latter's implementing regulations, there can be

[10] Repeated use of the term "qualification for receipt" or similar terms is made throughout. It is intended that an unemployed father is qualified to receive unemployment compensation if he would have been eligible to receive it upon filing an appropriate application.

no doubt that an unemployed father who is merely qualified to receive unemployment compensation is precluded from ANFC-UF eligibility.

42 U.S.C. §602(a)(7) provides that,

> A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

In 1968, the year Congress first required the States to deny AFDC assistance to families in which the father received unemployment compensation,[11] the mandate of section 602(a)(7) was being implemented in the rules contained in the United States Department of Health, Education and Welfare (HEW) *Handbook of Public Assistance Administration (Handbook)*.[12] And since HEW is the federal agency charged with the administration of the Social Security Act, deference must be given to its interpretations. *E.g.*, *Lewis* v. *Martin*, *supra*, at 559.

With respect to developing potential income and resources for recipients under Titles I, IV, X, XIV, and XVI of the Social Security Act, the *Handbook* provided as follows:

> The State has the responsibility for establishing policies with reference to potential sources of income that can be developed to a state of availability. *Handbook*, Part IV, §3120 (1966).

[11] See note 15, *infra*, at 13.

[12] These rules have been viewed as authoritative in several cases, including *Shea* v. *Vialpando*, 42 U.S.L.W. 4559 (U.S. Apr. 23, 1974), *Lewis* v. *Martin* 397 U.S. 552 (1970), and *King* v. *Smith*, 392 U.S. 309 (1968).

In explaining this policy, the *Handbook* dealt with the question of whether, under the above-mentioned Titles, the wife of a beneficiary under Old Age, Survivors and Disability Insurance (OASDI) benefits or a woman with a wage record must apply for reduced OASDI benefits if she was between age 62 and 65, or whether she could wait until age 65 and receive full benefits. The *Handbook* stated that the woman had an option, but went on to say:

> The Federal Act, however, does not give any individual a right to have his needs met out of an assistance program because of his refusal to accept any resource that is available to him upon application. *Handbook*, Part IV, §3140(4) (1964).

The *Handbook* also outlined the appropriate treatment of "Other Statutory Benefits." It stated:

> In addition to OASDI, other statutory benefits to which applicants and recipients for public assistance may qualify, include *unemployment insurance*, temporary disability insurance, railroad retirement benefits, civil service retirement benefits, other government retirement benefits (Federal, State, county and local), and veterans benefits. [emphasis added]
>
> It is important that the State's policies and procedures for determining eligibility on the basis of need include clear instructions to staff for identifying cases in which such statutory benefits might be a resource, and, with respect to such cases, the process of determining the availability of such resources. *Handbook*, Part IV, §3140(6) (1964).

These *Handbook* provisions have now been superseded by HEW regulations which require that ". . . only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . ." 45 C.F.R. §233.20(a)(3)(ii)

(c). Also, the state plan must "[p]rovide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability." 45 C.F.R. §233.20(a)(3)(ix).

Thus, the states have always had a clear obligation to take into consideration in determining eligibility all available sources of income, including unemployment compensation, under §602(a)(7) and its implementing regulations.[13] Therefore, it was unnecessary for Congress in 1968 to enact §607(b)(2)(C)(ii) in terms of both "receives" and "qualified to receive." The word "receives" by itself was sufficient to carry forward the policy then in effect. To have included words such as "qualified to receive" would have been redundant.

In Vermont there has never been any confusion on this point. The Department of Social Welfare has always interpreted the federal statute and regulations to require the denial of ANFC eligibility when an unemployed father was qualified to receive unemployment compensation benefits. Although, like the federal statute, §2333.1(3) of the Welfare Assistance Manual is drafted solely in terms of receipt of unemployment compensation, other sections of the Manual parallel the federal provisions and make it clear that the word "receives" is intended to include the qualification for receipt. In any event, this is how the regulation has been applied.[14]

[13] This point was recently reiterated by Mr. Justice Powell in *Shea* v. *Vialpando*, *supra*, at 4562. He stated: "Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account . . ." [emphasis in original text]

[14] It should be pointed out that the receipt or availability of other types of income or resources would not necessarily work a complete disqualification for ANFC benefits as would the receipt or availability of unemployment compensation. This fact merely demonstrates, however, that Congress intended to continue to treat as mutually exclusive the unemployment compensation program and the AFDC program. This point is discusssed, *infra*, at 16.

Thus, pursuant to §2270 of the current Manual,[15]

> All potential sources of income and/or resources to meet current or future needs of applicant(s)/recipient(s) shall be explored, identified, and if feasible, developed. The applicant/recipient shall be encouraged to take the initiative, when able, to secure such income and/or resources for himself, with the assistance, if needed, of department staff.
>
> Practical and feasible steps in identifying and developing potential income and/or resources include, but are not limited to the following . . .
> 2. Filing applications for benefits to which the individual may be entitled.

2. The Court's interpretation is contradictory to relevant legislative history.

The legislative history of §607(b)(2)(C)(ii), while limited, indicates that Congress intended to exclude from AFDC eligibility those families in which the unemployed father either receives or is qualified to receive unemployment compensation.

Prior to January, 1968, when Congress first required that states deny AFDC assistance to families when the father receives unemployment compensation, states had been given the option of denying all or any part of such assistance when unemployment compensation was received.[16] In the House

[15] Section 2270 states the general policy that has been in effect since Vermont began participating in the ANFC-UF program in July, 1968.

[16] As originally enacted in 1961, Congress temporarily expanded the definition of "dependent child" to include a child whose dependency was caused by the unemployment of a parent. The expanded definition was optional with the states, as it is today. Those states that chose to provide assistance under the expanded definition were given the option of providing for the denial of all or any part of the AFDC assistance

version of the January, 1968 amendment to the Social Security Act, (the version which was ultimately enacted), states were required to deny assistance if and for so long as the unemployed father received unemployment compensation. The amendment passed by the Senate, however, retained the option provision then in effect. The Conference Committee's report explained the import of both versions as follows:

> "Unemployed Fathers under AFDC"
>
> Amendments Nos. 186, 189, 190, 191, 193 and 195; Section 407 of the Social Security Act, as amended by Section 203(a) of the House bill, defined an unemployed father (for purposes of determining the eligibility of his children for AFDC) so as to *exclude* fathers who do not have six or more quarters of work in any thirteen calendar quarter periods ending within one year prior to the application for aid, *and fathers who receive (or are qualified to receive) any unemployment compensation under state law.* [emphasis added]
>
> *The Senate amendments removed these exclusions, and restored the provisions of the present law under which a state may at its option wholly or partly deny AFDC for any month where the father receives unemployment compensation during the month.* (The Senate amendments also removed certain work or training requirements in order to conform with amendment No. 198, and modified the effective date provisions of the House bill). The Senate recedes (except on the conforming amendments and effective date provisions). H. R. Rep. No. 1030, 90th Cong., 1st Sess. 57 (1967) [emphasis added].

for any month if the unemployed parent received unemployment compensation for any week during that month. Act of May 8, 1961, Pub. L.87-31, §1, 75 Stat. 75.

These provisions were extended for five years in 1962. Act of July 25, 1962, Pub. L. 87-543, Title I, §131(a), 76 Stat. 193.

In 1967, Congress extended the termination date from June 30, 1967 to June 30, 1968. Act of June 29, 1967, Pub. L. 90-36, §2, 81 Stat. 94.

In 1968, the provisions were amended twice. The first change provided for the application of the provisions to unemployed fathers rather than unemployed parents if and as long as the child's father received unemployment compensation. Act of January 2, 1968, Pub. L. 90-248, Title II, §203(a), 81 Stat. 882. The second change added the present language which prohibits the payment of AFDC benefits on the basis of the father's unemployment with respect to any week for which the father receives unemployment compensation. Act of June 28, 1968, Pub. L. 90-364, Title III, §302, 82 Stat. 273.

Thus, it is apparent that the Conference Committee understood the House version to "exclude" from AFDC eligibility those fathers who "receive" unemployment compensation as well as those who are "qualified to receive" unemployment compensation. In addition, the fact that the words "or are qualified to receive" are enclosed within parentheses suggests that the Conference Committee realized that the word "receives" as used in the amendment included both the actual receipt and the qualification for such receipt.

This interpretation is entirely consistent with what Congress was attempting to accomplish. The report of the House Committee on Ways and Means leaves no doubt that its primary purpose in amending the Unemployed Father provisions of the AFDC program was to reduce the welfare rolls.[17] One of the ways to effectuate this objective was to preclude AFDC eligibility to families in which the father was receiving (or qualified to receive) unemployment compensation.

With this clear purpose in mind, it would make little sense to deny eligibility to families of actual recipients while granting eligibility to families in which the father was qualified to receive unemployment compensation but chose not to apply.

[17] H. R. Rep. No. 544, 90th Cong., 1st Sess. 2 (1967)

3. The Court's interpretation undermines the traditional separateness of the unemployment compensation program and AFDC.

The interpretation of §607(b)(2)(C)(ii) which the District Court advances is inconsistent with the traditional relationship between the unemployment compensation program and AFDC. Historically, the two concepts have been considered mutually exclusive.

The purposes of unemployment compensation are outlined by Chief Justice Burger in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), wherein he quotes relevant excerpts from the legislative history of the unemployment compensation provisions of the Social Security Act as originally enacted in 1935. He states:

> The Social Security Act received its impetus from the Report of the Committee on Economic Security, [footnote omitted] which was established by executive order of President Franklin D. Roosevelt to study the whole problem of financial insecurity due to unemployment, old age, disability, and health. In its report, transmitted to Congress by the President on January 17, 1935, the Committee recommended a program of unemployment insurance compensation as a "first line of defense for . . . [a worker] ordinarily steadily employed . . . for a limited period during which there is expectation that he will soon be reemployed. This should be a contractual right not dependent on any means test . . . It will carry workers over most, if not all, periods of unemployment in normal times *without resort to any other form of assistance*." [footnote omitted] 402 U.S. at 130-31 [emphasis added].

And continuing at 131-32:

> The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers "to tide themselves over, until they get back to their old work or find other employment, *without having to resort to relief*." [footnote omitted] Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," [footnote omitted] serving to maintain the recipient at subsistence levels *without the necessity of his turning to welfare or private charity*. [emphasis added].

Clearly then, unemployment compensation was originally, and still is, intended to be an alternative to public assistance.

This fact is also supported in the legislative history of the AFDC program. The Aid to Dependent Children program, as it was originally called, was also created in the Social Security Act of 1935. The report of the Senate Committee on Finance, in discussing the aid to children provisions of H.R. 7260, the bill that was enacted, stated as follows:

> The heart of any program for social security must be the child. All parts of the Social Security Act are in a very real sense measures for the security of children. Unemployment compensation, for instance, will benefit many children in the homes of unemployed workers; and even old-age pensions and old age benefits will in many cases indirectly aid children in families whose resources have been drained for the support of aged grandparents.
>
> In addition, however, there is great need for special safeguards for many underprivileged children . . . S. Rep. No. 628, 74th Cong., 1st Sess. (1935)

From this language it is apparent that the Aid to Dependent Children program was not intended to assist the same category of children that would be benefited by unemployment compensation. The Aid to Dependent Children program was meant to cover children who were not members of families in which the father was eligible for unemployment compensation.

This distinction was somewhat obscured in 1961 when

Congress first expanded the definition of "dependent child" to include children of unemployed parents and gave states the option of treating unemployment compensation as they saw fit.[18] In 1968, however, the traditional separateness of the two programs was clearly reestablished. Thereafter, under 42 U.S.C. §607(b)(2)(C)(ii) the receipt (or qualification for receipt) of unemployment compensation acted as a complete bar to AFDC eligibility, rather than merely a factor to be considered. Only after the father became ineligible for unemployment compensation for which he was qualified, could his family become eligible for AFDC.

In *Burr* v. *Smith*, 322 F. Supp. 980 (W. D. Wash 1971), *aff'd mem.* 404 U.S. 1027 (1972), apparently the only other case in which 42 U.S.C. §607(b)(2)(C)(ii) has been involved, the Court addressed itself to the reasonableness of this separate treatment by stating:

> Many legitimate state interests arguably are served by relying exclusively upon unemployment compensation in the first instance. For example, primary reliance on unemployment reserves frees limited state funds for other uses, including the procurement of matching federal funds for public assistance program; the receipt of insurance benefits to which they have contributed may be better

[18] While the language of the pre-1968 statute does provide an option, the legislative history suggests that Congress did not in fact have this in mind. The provision which was ultimately enacted was added by the Senate Finance Committee after the legislation had been passed by the House. No public hearings were held, and the Committee report (S. Rep. No. 165, 87th Cong., 1st Sess. (1961)) sheds no light on the subject. During the floor debate, however, Senator McCarthy, a member of the Finance Committee, in response to a telegram critical of the Committee amendments, said the following:

> Mr. President, this is a temporary program to meet an emergency situation. Its purpose is to assist those families where the wage earner has exhausted his unemployment compensation or never had coverage. 107 Cong. Rec. 6400-01 (1961).

> for the morale of unemployed workers than would be dependence upon or even eligibility to receive welfare assistance; the receipt of unemployment compensation, which is temporary in nature, may act as a greater incentive for the unemployed to seek new employment than the receipt of welfare assistance.
>
> It is not our purpose here to list all the considerations which might justify the legislature's reliance on unemployment compensation. Our only purpose is to indicate that there are reasonable arguments which might form the legitimate legislative base for treating recipients of unemployment compensation differently from recipients of other income sources. [citation omitted] 322 F. Supp., at 985.

Although the Court in *Burr* was speaking only to the reasonableness of Washington's regulation, the rationale is equally applicable with respect to §607(b)(2)(C)(ii) as applied in the present case. The result of the District Court's ruling, however, would be to obliterate the clearly intended and rational distinction between the two programs.

4. The Court's interpretation is in complete conflict with the decision in BURR v. SMITH, 322 F. Supp. 980 (W. D. Wash 1971), aff'd mem. 404 U.S. 1027 (1972).

In *Burr* v. *Smith*, plaintiffs challenged on constitutional grounds a Washington statute and welfare regulation. The regulation was remarkably similar to the Vermont regulation in question here; it denied AFDC assistance to families in which the father received or was eligible to receive unemployment compensation. The regulation was based on 42 U.S.C. §607(b)(2)(C)(ii), as is Vermont's.

While the federal statute was not directly in issue, the three-judge District Court found no conflict between the statute and the state regulation, stating that the challenged regulation "was promulgated in direct response to the federal

provision." 322 F. Supp., at 983. Moreover, the Court determined that the regulation did not violate the Equal Protection Clause of the Fourteenth Amendment. The decision was affirmed by this Court without opinion.

The obvious result of this Court's affirmance has been to permit Washington to continue to carry out the mandate of 42 U.S.C. §607(b)(2)(C)(ii) by excluding from AFDC benefits those families in which father qualifies for unemployment compensation.

By contrast, the District Court's decision in the instant case has precluded Vermont from denying such families ANFC benefits. The decision was based on a construction of the same federal statute, and a Vermont regulation identical in effect to Washington's. Thus, the Court's decision in this case clearly conflicts with the decision in *Burr* v. *Smith*.

5. The Court's interpretation produces extraordinary results in that it would (a) shift the clear burden of supporting unemployed fathers and their families from employer contributions to welfare appropriations, (b) unjustly enrich former employers of unemployed fathers, and (c) encourage "program shopping."

If the Court's interpretation of the statute and regulation is followed, an obvious result would be to drastically shift the burden of supporting families of unemployed fathers from the unemployment compensation program to the AFDC program in those cases where the father is eligible for either and the welfare benefits prove to be higher.[19] The total onus would be forced upon the already strained welfare budgets, while accumulated unemployment compensation funds would remain intact. Surely, it would appear more logical from a social policy perspective to allocate these limited welfare appropriations to those families which have no

[19] In addition to weighing the monetary consideration, the individual would have to consider Medicaid and Food Stamp benefits which would be automatically available to members of his family as ANFC recipients.

alternative source of income. This is especially true where there is no suggestion whatsoever that Congress intended to alter the relative responsibilities of the programs.

As a related consequence, those former employers of unemployed fathers who are required by law to contribute to the unemployment compensation trust fund would be unjustly enriched. Since such fathers would be permitted to forego completely the unemployment compensation to which they are entitled, these employers would benefit over time through reduced rates of contribution.[20] It is highly doubtful that Congress intended such a potential windfall to employers at the expense of the taxpayer.[21]

In addition, the District Court's decision would encourage "program shopping." An unemployed father would be in a position to evaluate the relative benefits under each program, and apply for the most advantageous. The success of this approach, however, would depend on knowledgeable, well-informed applicants. Yet it is unlikely that the newly unemployed father would have sufficient information on which to make a reasonable choice. Under the Court's order, only those fathers who actually apply for ANFC benefits would be advised of their option; those who apply for

[20] In Vermont, those employers who are required to contribute do so according to a rate schedule which is determined by the amount paid in to the trust fund versus the amount paid out in benefits. Basically the less paid out, the lower the rate. (Vermont's unemployment compensation program is established under the provisions of 21 V.S.A. §1301, et seq. Rates of employer contributions are established under §§1324-27.)

[21] In an affidavit filed in the District Court, appellant Philbrook estimated, on the basis of statistics contained in an affidavit submitted by an employee of the Vermont Department of Employment Security, that the cost to Vermont in additional ANFC benefits could be as high as $1 million in fiscal year '75. Additionally, the federal share in Vermont could increase by approximately $2 million.

unemployment compensation would not. It is extremely unlikely that Congress intended to create such an irrational system.

CONCLUSION

It is the appellant's belief that the District Court has distorted the meaning of 42 U.S.C. §607(b)(2)(C)(ii) and §2333.1(3) of the Vermont Welfare Assistance Manual. While this interpretation allowed the Court to avoid a ruling on the constitutional issues, such avoidance should not be practiced for its own sake.[22] If Congress intended, as it clearly did, that the families of unemployed fathers should be barred from the receipt of AFDC benefits during the period that the father is eligible for unemployment compensation, then the statute and regulation should be given full force and effect, and the constitutional issues squarely faced.

The appellant is aware of course that the proper construction of the statute and regulation might create some inequities. Nevertheless, these inequities should not be overcome by subverting the will of Congress. If these inequities are constitutionally impermissible, then they should be overcome by a ruling to that effect. The Court's decision merely replaces an arguably questionable system with one clearly irrational.

Therefore, for the reasons expressed herein, the appellant contends that the questions presented by this appeal are sub-

[22] As Mr. Justice Brennan said recently in his dissenting opinion in *DeFunis* v. *Odegaard*, 42 U.S.L.W. 4578, 4589 (U.S. Apr. 23, 1974), "Although the court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases."

stantial and of great public importance. It is urged that probable jurisdiction be noted.

Respectfully submitted,

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APPENDIX A

JEAN GLODGETT ET AL., INTERVENORS,
v.
JOSEPH BETIT, INDIVIDUALLY AND AS COMMISSIONER OF THE VERMONT DEPARTMENT OF SOCIAL WELFARE; ELLIOTT RICHARDSON, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE.
Civ. A. File No. 6550.
United States District Court,
D. Vermont
Oct. 23, 1973.
Supplemental Opinion Dec. 28, 1973.

OPINION

HOLDEN, District Judge.

The Vermont Department of Social Welfare denies payment under its "Aid to Needy Families with Children" (ANFC) program to families in which the father receives unemployment compensation.[1] During any week in which the father receives unemployment benefits, his family is held ineligible for any ANFC payments, even if the unemployment payment is less than the ANFC payment which the family otherwise would have received. Vermont must op-

[1] Vermont Welfare Regulation 2333.1 provides in part:

"An 'unemployed father' is one whose minor children are in need because he is out of work, is working part time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

* * * * *

3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted."

erate its ANFC program in this manner in order for the ANFC-UF ("Aid to Needy Families with Children — Unemployed Father") segment of the program to receive federal financial assistance under the federal "Aid to Families with Dependent Children" (AFDC) program.[2]

The named plaintiffs, Glodgett, Percy and Derosia, are the parents and minor children of Vermont families who were denied ANFC assistance because of the receipt of unemployment compensation by the father in each of these families. On December 17, 1971, the Glodgett family's application for ANFC was accepted and they were allotted a monthly benefit of $239.00. On January 12, two days after Mr. Glodgett began receiving unemployment compensation from New Hampshire of $14.00 per week, he was notified by the state that his ANFC payments would be terminated as of February 16, 1972, by reason of his receiving unemployment compensation. The ANFC grant was reinstated soon after Mr. Glodgett ceased receiving unemployment benefits in March.

When Roger Percy's employment as a trucker was suspended, he began receiving unemployment benefits of $172.00 per month. Because of his receipt of unemployment compensation, his family was denied ANFC payments which would have totalled $410.00 per month, had the family not been disqualified.

[2] Although each state may refuse to participate in the federal welfare program, once a state decides to participate it must maintain a system consistent with the Social Security Act. *See Townsend* v. *Swank*, 404 U.S. 282, 285, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); *Rosado* v. *Wyman*, 397 U.S. 397, 419-420, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *King* v. *Smith*, 392 U.S. 309, 316-317, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). If a state elects to provide ANFC benefits to families with unemployed fathers (ANFC-UF), 42 U.S.C. §607 (b) (2) (C) (ii) requires that the state plan must deny benefits under §607 during any week in which the father receives unemployment compensation. See text, *infra*.

On October 25, 1972, the Derosia family qualified for ANFC assistance in the amount of $394.00 per month. On November 6 Mrs. Derosia notified Social Welfare that the family was receiving unemployment compensation of $56.00 per month. For this reason the Derosias' ANFC grant was terminated as of December 1, 1972.

The plaintiffs seek injunctive and compensatory remedies on their own behalf and also on behalf of the class they claim to represent. More particularly, they seek the following relief: permission to maintain this action as a class action; a declaration that 42 U.S.C. §607 (b) (2) (C) (ii) and Vermont Welfare Regulation 2333.1 are unconstitutional because they respectively violate the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. They seek an order enjoining the enforcement of the statute and regulation against the plaintiff class and compensatory ANFC benefits paid retroactively to the plaintiffs and class in the same amount that they would have been paid under 42 U.S.C. §606,[3] or as if the mother, instead of the father, had been receiving unemployment compensation.[4] They further request an order directing the Secretary of HEW to approve the Vermont ANFC-UF program without requiring the inclusion of a provision disqualifying families with fathers receiving unemployment compensation; and such further relief as the court deems appropriate. At oral argument the plaintiffs advanced an additional statutory claim, contending that Vermont Wel-

[3] Section 606, through the definition of "dependent child", authorizes payments to families in which a child has been deprived of parental support by reason of the death, absence or incapacity of a parent. See text, *infra*.

[4] Section 607 (b) (2) (C) (ii) provides for the disqualification from ANFC-UF benefits of families in which the father receives unemployment payments, but does not disqualify families in which the mother receives unemployment benefits. See text, *infra*.

fare Regulation 2333.1 is enforced inconsistently with 42 U.S.C. §607(b)(2)(C)(ii).

A three-judge court was convened, as required by 28 U.S.C. §§2281, 2282, since injunctive relief is sought against state and federal enactments on constitutional grounds. The defendant Betit at the time the action was commenced was Commissioner of Social Welfare for the State of Vermont. The defendant Richardson was then Secretary of the Department of Health, Education and Welfare. All parties have moved for summary judgment. Both defendants have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Class Action Status

The named plaintiffs contend they are representative of a class of Vermont families deprived of ANFC because the father receives unemployment compensation. In their complaint they request certification of this suit as a class action.

While the defendants do not contest the class action status of this suit, before the action may so proceed the court is called upon to determine whether the action is maintainable as a class suit. Fed.R.Civ.P. Rule 23(c)(1);[5] *Jackson* v. *Cutter Laboratories*, 338 F.Supp. 882, 886 (E.D.Tenn. 1970). An action is not maintainable as a class action merely because it is so designated in the pleadings. *Cash* v. *Swifton Land Corporation*, 434 F.2d 569, 571 (6th Cir. 1970); *In re Swan-Finch Oil Corporation*, 279 F.Supp. 386, 391 (S.D.N.Y. 1967). To the contrary, the plaintiffs in a purported class action bear the burden of establishing that their action meets the prerequisites of Rule 23. *Rossin* v. *Southern*

[5] Rule 23(c)(1) provides:
(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

Union Gas Company, 472 F.2d 707, 712 (10th Cir. 1973); *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972); *Daye* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1337, 1342 (E.D.Pa. 1972); *Clark* v. *Thompson*, 206 F.Supp. 539, 542 (S.D. Miss.1962), *aff'd* 313 F.2d 637 (5th Cir. 1963), cert. denied, 375 U.S. 951, 84 S. Ct. 440, 11 L.Ed.2d 312 (1963); *Free World Foreign Cars, Inc.* v. *Alfa Romeo*, 55 F.R.D. 26, 29 (S.D.N.Y.1972); see *Demarco* v. *Edens*, 390 F.2d 836, 845 (2d Cir. 1968); *Phillips* v. *Sherman*, 197 F.Supp. 866, 869 (N.D.N.Y.1961). This burden imposes upon the plaintiffs in a purported class action the responsibility to move for formal certification of their class action by the court under Rule 23(c)(1). *Herbst* v. *Able*, 45 F.R.D. 451, 453 (S.D.N.Y.1968); *Zeigler* v. *Gibralter Life Insurance Company*, 43 F.R.D. 169, 170 (D.S.D.1967).

In this case, beyond their request for certification in their complaint, the plaintiffs have not sought a formal determination of class action status. Thus the vital issues concerning the adequacy of representation which underly [*sic*] any representative action remain unattended and unresolved. The question of adequacy of representation, see *Hansberry* v. *Lee*, 311 U.S. 32, 41-43, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Herbst* v. *Able*, *supra* at 453 of 45 F.R.D., has not been answered. Nor have important issues concerning notice: whether notice is required not only if the damages aspect of the action is to be maintained, see *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1015 (2d Cir. 1973), but also if injunctive relief is sought on behalf of the class under Rule 23(b)(2), compare *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-565 (2d Cir. 1968); *Schrader* v. *Selective Service System Local Board No. 76 of Wisconsin*, 470 F.2d 73, 75 (7th Cir. 1972); *Zachery* v. *Chase Manhattan Bank*, 52 F.R.D. 532, 535 (S.D.N.Y. 1971), with *Yaffee* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1971); *Johnson* v. *Georgia Highway*

Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 n. 10 (D.D.C. 1972); *Vaughns* v. *Board of Education of Prince George's County*, 355 F.Supp. 1034, 1035 (D.Md. 1972); *Northern Natural Gas Co.* v. *Grounds*, 292 F.Supp. 619, 636 (D.Kan. 1968); 3B Moore, Federal Practice, ¶23.72, pp. 1421-1422 (1969). And if prejudgment notice is required here, the mechanics involved, such as the form the notice should take, have not been dealt with by the parties. Compare *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1015 (2d Cir. 1973), with *e.g.*, *Lopez* v. *Wyman*, 329 F.Supp. 483, 486 (W.D.N.Y. 1971); *Snyder* v. *Board of Trustees of the University of Illinois*, 286 F.Supp. 927 (N.D. Ill. 1968).

Despite the fact that these issues have not been attended to, the plaintiffs have pressed their motion for summary judgment. Without a determination of these issues, a representative action which seeks to affect the rights of absent parties may not proceed. See *Hansberry* v. *Lee, supra*; *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In moving for summary judgment without having sought a formal certification of this action as a class action, the plaintiffs leave us no choice but to dismiss the class aspects of this suit, on the ground that the plaintiffs have failed to meet their burden to prove that the action meets the prerequisites of Rule 23.

Jurisdiction

Section 1343(3) of Title 28, United States Code, affords jurisdiction over plaintiffs' claims against both the state and the federal defendants *Aguayo* v. *Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973); *cf. Macias* v. *Finch*, 324 F.Supp. 1252 (N.D. Calif. 1970), (3-Judge Court), *aff'd sub nom, Macias* v. *Richardson*, 400 U.S. 913, 91 S.Ct. 180, 27 L.Ed.2d 153 (1970); *Conner* v. *Finch*, 314 F.Supp. 364 (N.D. Ill.

1970), (3-Judge Court), *aff'd sub nom, Conner* v. *Richardson*, 400 U.S. 1003, 91 S.Ct. 575, 27 L.Ed.2d 618 (1971); but see *Stinson* v. *Finch*, 317 F.Supp. 581 (D. Ga. 1970), (3-Judge Court). Section 1343(3) provides original jurisdiction in the United States District Court of actions seeking redress for deprivations of constitutional rights occurring under color of state law or regulation.[6]

The plaintiffs have been denied ANFC-UF benefits, arguably in violation of their constitutional rights, under color of Vermont Welfare Regulation 2333.1. There is plainly subject matter jurisdiction over this suit under 28 U.S.C. §1343(3), albeit that there is no specific assertion of jurisdiction on this statute.

As defendant Betit is responsible for enforcing the state regulation in question, he is responsible in part for the denial of benefits to the plaintiffs, so there is jurisdiction over the claim against him. There is also jurisdiction over the claim against the Secretary of HEW, since his enforcement of 42 U.S.C. §607(b)(2)(C)(ii) requires the defendant Betit to deny ANFC benefits to the plaintiffs. Thus he is partially responsible for the deprivation of which all the plaintiffs complain.[7]

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[6] 28 U.S.C. §1343(3) provides:
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

[7] All that section 1343(3) requires for the exercise of jurisdiction is an alleged deprivation of Constitutional rights effected under color of state law or regulation. Given such a state action, which concededly occurred here, it is necessary to join as party defendants all persons responsible for that action. While the *Stinson* court felt that a Secretary of HEW could not properly be joined, because of his administration of

The failure of the plaintiffs to plead section 1343(3) as a basis for the court's authority over the claim against the Secretary is not a serious jurisdictional defect. While it is the duty of the court to take note of any defects of jurisdiction so that the mandate of the statutes which limit jurisdiction will be observed, *Arnold* v. *Troccoli*, 344 F.2d 842 (2d Cir. 1965), a statute conferring federal jurisdiction need not be specifically pleaded if facts giving the court jurisdiction are set forth in the complaint. *New York State Waterways Association, Inc.* v. *Diamond*, 469 F.2d 419, 421 (2d Cir. 1971); *Eidschun* v. *Pierce*, 335 F.Supp. 603, 615 (D.Iowa

a federal matching grant statute, as a party defendant to a civil rights action challenging the state statutory program receiving the matching funds, we do not agree.

First, the *Stinson* court took the view that 28 U.S.C. §1391(e) barred the exercise of personal jurisdiction over the Secretary by the court in the district where the claim arose, if a non-federal party were joined as a party defendant. The law in this circuit is to the contrary. *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1382 n. 5 (2d Cir. 1970).

Second, it is highly unrealistic to suppose that the threat by a federal official of a denial to a state or federal ANFC-UF matching funds, in retaliation for a refusal by the state to operate its ANFC-UF program in a certain way, does not make that official partially responsible for the manner in which the program is operated. The *Stinson* court's denial of this responsibility would sanction a federal statute which, arguably, authorizes the states to violate the Equal Protection Clause, contrary to the express prohibition against such Congressional action in *Shapiro* v. *Thompson*, 394 U.S. 618, 641, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

To the extent there is any doubt about the propriety of extending 1343(3) jurisdiction over the claim against the federal defendant here, the doubt should be resolved in favor of jurisdiction, to avoid the anomaly of denial of federal jurisdiction over a suit against a federal officer challenging the constitutionality of a federal statute involving social welfare, an area in which the federal courts have particular expertise. See Friendly, Federal Jurisdiction: a General View 69-70, 121-122; Wright, Law of Federal Courts 110; *Aguayo* v. *Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973).

1971); see also *Phillips* v. *Rockefeller*, 321 F.Supp. 516 (S.D.N.Y.1970), aff'd, 435 F.2d 976 (2d Cir. 1970). The motions of the defendants to dismiss for want of jurisdiction of the subject matter of this controversy must be denied.

The Statutory Scheme

Title IV (42 U.S.C. §601 *et seq.*) of the Social Security Act provides for a cooperative federal-state program to assist needy families with children. States are not required to establish such programs. If they do, they must submit their plan to the Secretary for approval. Every state has established such a program.[8] If the plan submitted meets the requirements of 42 U.S.C. §602(a) and contains none of the conditions prohibited in §602(b), then the Secretary "must approve" it. Upon approval, the state becomes entitled to receive substantial federal funding for payments made in accordance with the plan and applicable federal conditions. Vermont's plan has been approved by the Secretary.

As originally established by the Social Security Act of 1935, the program for aid to dependent children did not provide for the needs of children caused by the unemployment of a parent. *King* v. *Smith*, 392 U.S. 309, 327-330, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). In 1961 the Act was amended to allow states the option of extending coverage to children who were needy because of the unemployment of a breadwinning parent. The 1961 amendment provided that a state could, if it chose to do so, deny all or any part of an AFDC stipend to a family during any month in which

[8] *Dandridge* v. *Williams*, 397 U.S. 471, 472-473, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). For a general picture of AFDC as established by the Social Security Act, *see King* v. *Smith*, 392 U.S. 309 (1968); *Rosado* v. *Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Dandridge* v. *Williams*, *supra*.

the supporting parent received unemployment compensation.

In 1968 the section of the act relating to ANFC-UF was amended to include the provisions challenged here. Benefits became available to a family whose need was occasioned by the unemployment of a father, under standards prescribed by the Secretary; formerly, benefits accrued to a family whose need was caused by the unemployment of a parent, as defined by the state. The 1968 amendment also mandated denial of benefits to a family during any week in which the father received unemployment compensation. Formerly the Act allowed the state the option of enforcing a complete or partial denial of benefits, or a full stipend without reduction, for any month during which the parent received unemployment compensation.

Section 606(a), by definition of "dependent child," provides for assistance to families who are needy because of deprivation of parental support or care by reason of the death, continued absence or physical or mental incapacity of a parent. Section 607 enlarges this coverage to authorize benefits to children who are needy as a result of the unemployment of the father.

Section 607(b) makes this extended coverage applicable "to a State if the State's plan, approved under Section 602 of this title —

(2) provides —

(C) for the denial of aid to families with dependent children to any child or relation specified in subsection (a) of this section — (i) if, and for so long as, such child's father is not currently registered with the public employment office in the State, and

(ii) with respect to any week for which the child's father receives unemployment compensation under

an unemployment compensation law of a State or of the United States."

Vermont has elected to extend its ANFC program to include those who have been deprived of parental support or care by reason of the unemployment of the father under 42 U.S.C. §607. In response to the requirements of that section, it has promulgated Welfare Regulation 2333.1. This regulation renders the family of an unemployed father eligible for ANFC-UF benefits if the father "is not receiving Unemployment Compensation during the same *week* as assistance is granted." (Emphasis in original text.)

This is in contrast to the treatment afforded ANFC families who receive income in a form other than unemployment compensation received by the father. The receipt of such income does not render the family ineligible for ANFC; the amount of the receipt is simply deducted from the ANFC payment which the family would normally receive.[9]

[9] Under the Vermont plan, approved by the Secretary of HEW as consistent with the requirements of the Social Security Act, receipt of income does not render a family per se ineligible for ANFC. If the amounts received are insufficient to bring the family's income above the state-determined standard of need, those amounts are simply subtracted from the amount of the grant to which the family is entitled. Under Vermont Welfare Regulation 2601, the "Vermont ANFC payment level" is defined as the sum of the ANFC basic needs standard and shelter expense, minus "the budgeted income of the applicant and his legal dependents." "Budgeted income" is defined as "gross monthly income received from any source by the applicant and his legal dependents without income exclusions for any purpose." *Id.* "Unearned income" is explicitly defined to include "income from pension and benefit programs, such as Social Security, Railroad Retirement, veteran's pension or compensation, Unemployment Compensation, employer or individual private pension plans and/or annuities, etc." Vermont Welfare Regulation 2253.

For example, suppose a family is in need because of the father's illness and the father receives a veteran's pension. The family is not disqualified from receiving ANFC. If it is eligible for ANFC, it

The Statutory Claim

The plaintiffs rely on the language of §607 to assert the claim that an unemployed father can avoid disqualification from ANFC-UF benefits by refusing to accept unemployment compensation. In this they rightfully maintain that a family eligible for ANFC benefits under section 607 can be excluded only for each week in which unemployment compensation is actually received by the father. It is clear from the language of the statute that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation. And in this construction the defendants concur. We find nothing in the legislative history of the enactment at variance with this construction.

Since actual payment of unemployment compensation is the controlling factor, rather than eligibility for such payment, the statute affords the unemployed father an option. There is no compulsion that he accept unemployment compensation. He may accept such payment and forego ANFC-UF benefits for himself and his family, or he may accept the benefits afforded by the ANFC-UF program at the cost of surrendering unemployment compensation. The option is to receive (a) ANFC without unemployment compensation, or (b) unemployment compensation without ANFC. We construe this option to operate as follows: If a father otherwise eligible for ANFC-UF receives unemployment

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receives an ANFC payment equal to the state standard of need reduced by the amount of the veteran's benefit.

We use the term "state standard of need" to mean the amount of money that a family qualifying for ANFC is entitled to receive. The standard varies according to the number of persons in the group eligible for assistance, the number of persons in the household where the group resides, the place of residence of the group, and the form of housing involved, and includes funds to allow the recipient group to purchase the necessities of life: food, clothing, fuel, utilities, housing, etc. Vermont Welfare Regulation 2211.1-2211.2.

benefits which are less than the ANFC payment for which he qualifies, he can reject the unemployment check in favor of the ANFC payment, thereby receiving an income consistent with the state standard of need. If, on the other hand, he receives an unemployment check which is larger than his ANFC stipend would be, he can accept it, and thereby forego his right to ANFC for that week. In either event, the option available to him will provide total income equal to or greater than the state standard of need.

[6] This result provides the same relief the plaintiffs seek to achieve by way of their constitutional claims. In those claims the plaintiffs seek a judicial determination that families of unemployed fathers applying for AFDC should receive the same treatment as families in need for other reasons, who qualify for AFDC under §606. Their concern is that families of unemployed fathers, like other families applying for AFDC, should be assured of receiving an income equal to the state standard of need, irrespective of their eligibility to receive outside income. The option afforded by our construction of 42 U.S.C. §607(b)(2)(C)(ii) provides this protection. Since our construction of this statute resolves this case, we are precluded from reaching the plaintiffs' constitutional claims. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936), (Brandeis, J., concurring).

It is clear from the information before the court the extent to which the plaintiffs have been damaged financially by the failure of the Vermont Department of Social Welfare to afford them a choice between unemployment compensation and ANFC-UF. It appears from oral argument and from the stipulated facts filed by the parties that, to an extent which has not been made precisely clear, the State of Vermont supplemented the plaintiffs' unemployment compensation checks with funds from General Assistance, thereby

reducing the actual loss each plaintiff suffered when his family was disqualified from ANFC-UF. If the plaintiffs are able to make a showing that they have suffered pecuniary loss as a result of this disqualification, we consider it a proper exercise of our equitable powers to afford the plaintiffs the option of re-tendering their unemployment compensation benefits and receiving ANFC benefits in lieu thereof for the relevant weeks in which the receipt of unemployment compensation has adversely affected the financial interest of the family concerned.

The parties are directed to prepare a proposed decree for approval by the court in accordance with the views expressed in this opinion.

SUPPLEMENTAL OPINION AND ORDER

PER CURIAM.

Plaintiffs have filed a motion for rehearing on dismissal of the class action. Defendant Philbrook has filed a motion for a new trial.

Since the motion for a new trial presents nothing for consideration that was not presented to the court originally and is in essence a petition for rehearing, it is hereby denied.

While the motion for rehearing on dismissal of the class action may present viable matter, since the original decision of the court and motion here filed, the United States Court of Appeals for the Second Circuit has held in *Galvan* v. *Levine*, — F.2d —, —, — (2d Cir. 1973), that where the relief sought as to the class, as here, is prohibitory only, that is, seeks only declaratory or injunctive relief, and class action designation is therefore largely a formality, what is important is that the "*judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated . . . ." *Id.* at —. We would assume that the State here would have understood the judgment to bind it in the future with respect to all claimants, in any event. Lest there be any mistake, however, in submitting a decree for our signature pursuant to the final paragraph of the opinion dated October 17, 1973, appropriate language to insure that the decree runs for the benefit of all others similarly situated in the future is hereby directed to be included. To the extent that plaintiffs' motion seeks to have retroactive reimbursement for unnamed parties, members of plaintiffs' class, in line with the actual relief given to the named plaintiffs and intervenors, class action designation is hereby refused, such a class action being unmanageable, notice being impracticable, and defendant being put to unwarranted inequitable administrative difficulty thereby.

APPENDIX B

United States District Court
District of Vermont

CIVIL ACTION NO. 6550

ROGER C. DEROSIA AND ARLENE M. DEROSIA, LARRY, HAROLD, ARTHUR, MARY AND BRIAN DESORIA, MINORS, BY THEIR MOTHER AND NEXT FRIEND, ARLENE M. DEROSIA: ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED;
JEAN GLODGETT AND DEANNA GLODGETT, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, TINA GLODGETT;
ROGER PERCY, SR. AND ROSAMOND PERCY, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, SHARON, SHEILA, ROGER, MARY, MATTHEW AND CHARON PERCY, AND ALL OTHERS SIMILARLY SITUATED

v.

PAUL R. PHILBROOK, INDIVIDUALLY AND AS COMMISSIONER OF THE VERMONT DEPARTMENT OF SOCIAL WELFARE;
CASPER W. WEINBERGER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

ORDER OF JUDGMENT

Upon the basis of the evidence, the arguments of counsel, and the opinions of this court dated October 17, 1973, and December 28, 1973, it is ordered, adjudged and decreed that:

(1) 42 U.S.C. §607(b)(2)(C)(ii), 45 CRF §233.100(a)(5)(ii) and Vermont Welfare Regulation 2331.1 [*sic*] excludes families in which the father is unemployed from benefits only for those weeks in which the father actually receives state unemployment compensation. The disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation, and there is no compulsion to accept UCC. If the father receives UCC benefits which are less than the ANFC payment for which he qualifies, he is afforded, under the statute, an option and can reject the UCC check in favor of the ANFC payment, thereby receiving an income consistent with the state standard of need.

(2) The Department of Social Welfare shall advise applicants who have been certified as eligible for ANFC-UF that they may elect to reject their UCC payments in favor of the ANFC payment for which they are otherwise qualified.

(3) The Secretary of HEW shall approve the Vermont ANFC-UF program in accordance with the interpretation given Section 607(b)(2)(c)(ii).

(4) This order shall bind the defendants from the date of judgment with respect to all others similarly situated as the plaintiff.

(5) Plaintiffs Glodgett, Percy and Derosia shall be given the option of retendering their unemployment compensation benefits and receiving ANFC benefits in lieu thereof, less any General Assistance paid, for the relevant weeks in which the receipt of unemployment compensation has adversely affected the financial interest of the family concerned.

Upon stipulation by the parties, if the above-mentioned named plaintiffs elect to retender their UCC and GA grants, payments, taking into account those grants, would be made as follows: $207.17 to the Glodgetts, $342 to the Percys, and $21.20 to the Derosias.

DATED at Burlington in the District of Vermont, this 20th day of February, 1974.

SO ORDERED.

/s/ James L. Oakes,
U.S. Circuit Judge

/s/ James S. Holden,
U. S. District Judge

/s/ Albert Coffrin,
U. S. District Judge

APPENDIX C

United States District Court
District of Vermont

CIVIL ACTION NO. 6550

PAUL R. PHILBROOK, INDIVIDUALLY AND AS COMMISSIONER OF THE VERMONT DEPARTMENT OF SOCIAL WELFARE; CASPER W. WEINBERGER, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Appellants

v.

ROGER C. DEROSIA AND ARLENE M. DEROSIA, LARRY, HAROLD, ARTHUR, MARY AND BRIAN DESORIA, MINORS, BY THEIR MOTHER AND NEXT FRIEND, ARLENE M. DEROSIA, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; JEAN GLODGETT AND DEANNA GLODGETT, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, TINA GLODGETT; ROGER PERCY, SR. AND ROSAMOND PERCY, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, SHARON, SHEILA, ROGER, MARY, MATTHEW AND CHARON PERCY, AND ALL OTHERS SIMILARLY SITUATED.

Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul R. Philbrook, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of a Three Judge District Court entered in this action on February 21, 1974.

This appeal is taken pursuant to 28 USC §1253.

Dated: April 8, 1974

/s/ DAVID L. KALIB,
Assistant Attorney General
Office of the
Attorney General
Montpelier, Vermont 05602
(802) 828-3445
Attorney for Appellant
Paul R. Philbrook

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon Richard Kohn, Esq., attorney for the appellees, by posting a copy of same in United States mail receptacle, first class mail, addressed to his last known office address, 26 State Street, Montpelier, Vermont, on this 8th day of April, 1974.

/s/ DAVID L. KALIB,
Assistant Attorney General

APPENDIX D

UNITED STATES CODE

42 U.S.C. §607. Dependent children of unemployed fathers; definition

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title —

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when —

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this sec-

tion) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under and unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides —

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be certified to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependend children to any child or relative specified in subsection (a) of this section —

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b) (1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b) (2) of this section), under the program therein specified to certify such father to the Secretary of Labor pursuant to section 602(a) (19) of this title.

(d) For purposes of this section —

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a) (2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if —

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

APPENDIX E

Vermont Welfare Assistance Manual

2333.1 Unemployed Father

An "unemployed father" is one whose minor children are in need because he is out of work, is working part-time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

1. He has not refused, without good cause, within this 30 day period a bona fide offer of employment or training for employment, and is currently registered with the State employment service.
2. He has 6 or more quarters of work in any 13 calendar quarter period ending within one year prior to application for assistance, or received or was qualified to receive Unemployment Compensation within one year prior to application for assistance.
3. He is not receiving Unemployment Compensation during the same *week* as assistance is granted.
4. If employed, he is employed less than 100 hours per month: or exceeds that standard for the month of application if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100 hour standard for the two months prior to application and is expected to be under the standard during the next month.

Full-time employment, although earnings may be insufficient to meet family need, is not considered "unemployment." Income from fewer than four boarders is not considered "employment."

When an applicant father states that his physical or mental health prevents him from obtaining gainful employment, eligibility shall be established on the basis of a medical determination of incapacity rather than unemployment.